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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM THOMAS PANZA,

Defendant and Appellant.

D048802

(Super. Ct. No. SCD193284)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

William Thomas Panza entered guilty pleas to one count of attempted robbery (Pen. Code, §§ 664/211),¹ and two robberies while released on bail (§§ 211, 12022.1, subd. (b)). He admitted two prior strikes (§§ 667, subds. (b)-(i), 1170.12, 668), and two prior serious felony convictions (§ 667, subd. (a)(1)). The court struck one prior strike (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and sentenced him to prison

¹ All statutory references are to the Penal Code.

for 19 years four months: double the two-year lower term on one conviction of robbery with a prior strike, a consecutive two years for the second conviction of robbery with a prior strike (double one-third the middle term), and 16 months for attempted robbery with a prior strike (double one-third the middle term), enhanced by two 5-year terms for the prior serious felony convictions and two years for committing the robberies while released on bail. Panza contends the trial court erred in imposing consecutive sentences on the two robbery convictions.

FACTS

Viewing the record in the light most favorable to the judgment below (*People v. Johnson* (1980) 26 Cal.3d 557, 576), the following occurred. On August 24, 2005, Panza approached a cashier at a Rite-Aid store in National City. Panza was wearing a bandana covering the lower portion of his face and held his hand in his shirt around the waist. Panza demanded money. The victim's husband, who was near the cash register, "punched" Panza, and detained him until police arrived. On October 4, 2005, while released on bail, Panza entered a Bank of America in Chula Vista. He was wearing a mask. He pushed a customer out of the way, approached a teller, and demanded money. After obtaining money from the teller, Panza went to a second teller and again demanded money. Before he left the bank, a customer tackled Panza and held him until police arrived.

DISCUSSION

At the outset, the People argue that Panza waived raising the issue of consecutive sentences on appeal because he did not object in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331.) Because Panza's trial counsel argued that the court should impose concurrent terms, we will consider the merits of his claim.

Consecutive sentences are mandatory when a defendant with a prior strike is convicted of multiple current crimes that occur at different times and places. Consecutive sentences are discretionary when the crimes occur on the same occasions or arise from the same operative facts. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512-514.) Here, because Panza had a prior strike and the attempted Rite-Aid robbery (count 1) occurred at a different time and place than the robberies at the bank (counts 2 and 3), the trial court was required to impose a consecutive term for count 1.

Regarding imposition of consecutive sentences for counts 2 and 3 (the two robberies at the bank), Panza argues the trial court lacked authority to impose consecutive sentences. Alternatively, he contends even if the court had authority to impose consecutive sentences on counts 2 and 3, it abused its discretion in doing so.

Authority to Impose Consecutive Sentences

The trial court imposed consecutive sentences on the robberies in counts 2 and 3 because the two crimes involved separate victims. Relying on *People v. Humphrey* (1982) 138 Cal.App.3d 881, 882-883, Panza argues this was improper as each crime involved only one, not multiple, victims. In *Humphrey*, the court interpreted the meaning

of California Rules of Court, rule 425² (now rule 4.425)³ which, prior to 1991, provided that one factor to consider in determining whether to impose consecutive sentences was whether "[a]ny of the crimes involved multiple victims." The court concluded that multiple victims referred to more than one victim per crime, not multiple crimes, each with a single victim. Accordingly, the appellate court determined the trial court had erred in imposing consecutive sentences on the ground of multiple victims where the defendant was convicted of multiple counts of robbery, each count involving a single victim. Thereafter, several other courts followed the *Humphrey* court's rationale. (See *People v. Calhoun* (2007) 40 Cal.4th 398, 407-408, fn. 6 (*Calhoun*).) In 1991, the Legislature removed multiple victims as a factor in determining whether to impose consecutive or concurrent terms (rule 425, now 4.425). It also removed this criteria from the list of aggravating factors (rule 421, now 4.421). (See *Calhoun, supra*, at pp. 405-406, fn. 4.)

Recently, in *Calhoun, supra*, 40 Cal.4th at pages 405 through 406, the Supreme Court addressed the issue of the appropriate use of multiple victims as a sentencing factor. Although the case arose in the context of interpreting aggravating factors, it also referenced the use of multiple victims in selecting a consecutive sentence. In *Calhoun*, codefendants Calhoun and Waller were convicted of two counts of vehicular manslaughter with gross negligence and two counts of reckless driving causing bodily injury. Each of the four crimes caused injury or death to a single, distinct victim. The trial court sentenced Walker to an upper term on one manslaughter conviction and

² All rule references are to the California Rules of Court.

³ Rule 425(a)(4) was deleted as of January 1, 1991 and replaced with rule 4.425.

concurrent terms on the second manslaughter conviction and the two reckless driving convictions. (*Id.* at p. 401.)⁴ One of the reasons the trial court gave for choosing the upper term was multiple victims. (*Id.* at p. 405.)

In reviewing the propriety of the sentence, the Supreme Court discussed the 1991 change in rule 421 and concluded that removal of the multiple victims criteria from the rule governing aggravated sentences did not prevent the court from relying on the fact that the crimes involved multiple victims. (*Calhoun, supra*, 40 Cal.4th at pp. 405-406, 408.) The court noted that Waller's "single act of violence caused either the death or serious injury of four people[.]" and that "the gravity of and his culpability for this offense is increased by the number of [victims.]" (*Id.* at p. 408.) Thus, the trial court did not err in finding that the crimes were aggravated by multiple victims. The Supreme Court also observed, "[n]or should the trial court's sentencing discretion be limited, as Waller suggests, to imposing consecutive sentences. There is no persuasive reason why the trial court should not be allowed to consider the fact of multiple victims as a basis for imposing either the upper term or a consecutive sentence, although it cannot do both. (Rule 4.425(b)(1).)" (*Ibid.*)

Based on *Calhoun*, Panza acknowledges that a trial court may properly consider multiple victims as a factor in aggravation when considering whether to impose the

⁴ In *Calhoun*, the Supreme Court noted that the requirement that a jury determine the facts relied on in choosing the upper term as expressed in *Cunningham v. California* (Jan. 22, 2007) 549 U.S. ____ [2007 166 L.Ed.2d 856] was satisfied because the jury's convictions of two counts of vehicular manslaughter and two counts of reckless driving causing bodily injury "necessarily found there were multiple victims." (*Calhoun, supra*, 40 Cal.4th at p. 406.)

lower, middle or upper term, even though there is only one victim per count. But, he argues the Supreme Court's statement regarding consecutive sentences is mere dicta and not controlling. We disagree. "To say that dicta are not controlling [citation] does not mean that they are to be ignored: on the contrary, dicta are often followed. A statement that does not possess the force of a square holding may nevertheless be considered highly persuasive, particularly when made by an able court after careful consideration, or in the course of an elaborate view of the authorities, or when it has been long followed." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 947, p. 989.) In *Calhoun*, an able court engaged in an elaborate analysis and determined that multiple victims, one per count, may be used to impose an aggravated or consecutive term.

In any event, the holding in *Calhoun* allows use of the multiple victims factor under rule 4.425(b), which provides:

"Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

"(1) A fact used to impose the upper term;

"(2) A fact used to otherwise enhance the defendant's prison sentence; and

"(3) A fact that is an element of the crime may not be used to impose consecutive sentences."

Because *Calhoun* makes clear that multiple victims is a valid circumstance in aggravation, under rule 4.425(b) it is also an appropriate circumstance in determining whether to impose consecutive or concurrent terms. Here, as long as the trial court did not aggravate the sentence based on the multiple victims factor, it had authority to rely on this factor when selecting consecutive terms.

Abuse of Discretion

Panza argues that even if the trial court had authority to rely on multiple victims in choosing to impose consecutive sentences, it abused its discretion here in doing so. He agrees that the trial court had discretion to impose consecutive or concurrent sentences. (See *People v. Scott, supra*, 9 Cal.4th at p. 349.) He argues that the trial court abused its discretion in choosing to impose consecutive sentences because multiple victims did not increase the seriousness of his crimes. However, consecutive terms are appropriate when a defendant takes money from separate individuals by means of force or threat. (*People v. Thurs* (1986) 176 Cal.App.3d 448, 452.) A court abuses its discretion only when acting arbitrarily or in a capricious manner. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Here, the consecutive sentences were justified because Panza took money from separate individuals. Further, the court showed leniency through dismissal of one prior strike and imposition of the lower term. The trial court could have exercised discretion to impose a sentence far longer than 19 years four months. In light of *Calhoun, supra*, 40 Cal.4th 398, and rule 4.425(b), the court did not abuse its discretion in imposing the 19-year-four-month sentence.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.